

*United States Court of Appeals
for the Second Circuit*



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74-2592

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETER BARTOK,

Plaintiff-Appellant, :

v. : No. 74-2592

BOOSEY & HAWKES, INC. and
BENJAMIN SUCHOFF, as TRUSTEE
OF THE ESTATE OF Bela Bartok,

Defendants-Appellees :



Brief of The Authors League of America, Inc.,
as Amicus Curiae

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of the Estate of Bela Bartok, :
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Brief of The Authors League of America, Inc.,
as Amicus Curiae

Interest of The Authors League

The Authors League is the national society of professional writers and dramatists. One of its principal purposes is to express their views in cases involving fundamental issues of copyright law. This appeal presents such an issue -- i.e., whether an author's spouse and children will be deprived of their statutory right to secure renewal copyright when the publisher first distributes printed copies of a work after the author's death. The District Court adopted a definition of "posthumous" works that would cause widespread forfeiture of renewal rights which Congress had intended to secure for the widow (or widower) and children of a deceased author. Since the issue is of such vital importance to writers and their families, The Authors League respectfully requests permission to file this brief amicus curiae.

Introductory Statement

During Bela Bartok's lifetime, his CONCERTO FOR ORCHESTRA was performed several times in Boston's Symphony Hall and New York's Carnegie Hall, and broadcast on radio. Soon after his death, Boosey & Hawkes, his publishers, sold copies of the CONCERTO and copyrighted it. Had this occurred before the composer's death, unquestionably his widow and son, Peter Bartok, would own the renewal copyright in the work. However, the District Court ruled that since Boosey & Hawkes did not place copies on sale until after Bartok's demise, the CONCERTO became a "posthumous" work under the Copyright Act, and they became entitled to secure the renewal copyright, dispossessing his widow and son.

We believe the District Court erred. Its interpretation of the statutory term "posthumous work" contradicts the context and clear-cut purpose of Sec. 24, produces inequitable consequences, and leads to absurd and illogical applications in various situations. The Authors League submits that a work is "posthumous", within the meaning of Sec. 24, only if the rights to copyright or exploit it were not granted by the author, or exercised, during his lifetime -- but rather, the work remained dormant during his life and the rights passed under his will or by intestacy to his heirs. Moreover, we agree with plaintiff that a work made known to the public during the author's lifetime through public performances and broadcasts is not a "posthumous work" within the meaning of Sec. 24. Indeed, if "publication" is a criterion of posthumousness, and we do not believe it is, then such performances and broadcasts are "publication" within the meaning of the "posthumous" proviso of Sec. 24.

I.

A Work Created And Sold Or Licensed By Its
Author During His Life Is Not A "Posthumous
Work" Under Sec. 24 Of The Copyright Act

(i) Since the statutory term "posthumous work" is not defined in the Copyright Act, its meaning must be determined from the purpose and context of Sec. 24, bearing in mind the principle of construction emphasized by the Supreme Court in DeSylva v. Ballantine, 351 U.S. 570. Rejecting the normal disjunctive sense of "or", as used in the same section, the Court said:

"The statute is hardly ^{UN}ambiguous, however, and presents problems of interpretation not solved by literal application of words as they are 'normally' used. The statue must be read a whole, and (by) putting each word in its proper context... (at p. 573).

Here the caution is all the more necessary since "posthumous" in its most literal sense does not even encompass "publication" after death; and "publication" has literal, colloquial and Copyright Act meanings other than the sale and distribution of printed copies. In short, there was no reason for the District Court to adopt a definition which it conceded would flatly frustrate the purpose of Section 24.

(ii) The Renewal section's purpose is explained in the 1909 House Judiciary Committee Report (No. 2222, 60th Cong., 2d Sess., pp. 14-15). When an author "sells his copyright outright", Sec. 24. enables him, or his widow and children, "to take the renewal term" so they may have the benefit of the work in its later years. Ordinarily, when an "author sells his copyright outright",

he conveys the work to the publisher before copyright is secured, and the publisher secures the original copyright in its name. And it is precisely in this situation that the Renewal Section was intended by Congress to grant the author's widow and children the right to secure the renewal copyright, when he does not live until the renewal year. Thus the widow and children are entitled to obtain the renewal copyright even though the author may have executed an assignment of it during the first term. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 653; Miller Music Corporation v. Charles N. Daniels, Inc., 362 U.S. 373; DeSylva v. Ballantine, 351 U.S. 570.

Here, Bela Bartok "sold his copyright outright" to a publisher and died before the renewal year. Unquestionably, the plaintiff and his mother would have been entitled to secure the renewal copyright if the publisher not placed printed copies of the CONCERTO on sale for the first time after the publisher's death. And as the District Court conceded -- if the purpose of the renewal clause governed, it should have held that widow and son were entitled to the renewal copyright when copies were first placed on sale after Bartok's death. But the Court felt a semantic compulsion to read into Section 24 a "definition" of posthumous which led it to the opposite, and erroneous, conclusion. We respectfully submit that under DeSylva v. Ballantine, the District Court's definition is so completely contrary to the purpose and context of Sec. 24 that it must be rejected by this Court. [Indeed, as the District Court conceded, Bartok's CONCERTO was not literally

"posthumous", it was born before rather than after his death.]

(iii) The Authors League submits that the following definition of "posthumous work" is the one which logically and equitably complies with the purpose and context of Section 24. Namely, that a work is "posthumous" only if the rights to copyright or exploit it were not granted by the author , or exercised, during his lifetime; but rather, the work remained dormant during his lifetime and the rights in it passed under his will, or by intestacy, to his heirs . (It is in this sense that Judge Hand made his fleeting reference to the "passing" of a literary work before publication. Schapiro, Bernstein & Co. v. Bryan, 123 F. 2d 697, 699.) Under this definition, the deceased author's widow and children would secure the renewal copyright when he had "(sold) his copyright outright" -- thus preserving the purpose of Sec. 24.

(iv) Moreover, this definition is consistent with the understanding of the author and composer, and the context in which they dealt. Certainly, neither Bartok nor any other composer who delivers a work to a publisher under a contract providing for its publication and performance, considers that he is dealing with a "posthumous work"; nor does the publisher. Consequently, no living author would think to make provisions to avoid the trap set by the District Court's definition, and none has. Thus, left to stand, the District Court's definition would destroy the renewal rights of many widows, widowers and children of deceased authors; and would give many publishers an unexpected windfall.

(v) We submit that the definition proposed in (iii) also is

consistant with the only plausible reason for allowing the original copyright proprietor to obtain the renewal in a "posthumous work." While the 1909 Judiciary Committee report does not give a reason, it suggests one in its discussion of renewing copyrights in encyclopedic works, noting the difficulties that would arise if many, widely scattered contributors had to join in the renewal. When a work remains dormant during an author's life and all rights pass by will or intestacy to his heirs, decades may elapse before they or their heirs grant rights to a publisher. In these circumstances, neither the author's widow, widower or children would be alive to renew, and the proliferation of heirs over several generations before copyright is secured could create similar difficulties in obtaining the renewal in a truly "posthumous work." However, when an author, during his lifetime, grants a publisher the rights to publish and perform a work, the renewal term normally will mature during the life-span of his children -- as it did here.

Moreover, any delay in copyrighted the work or placing printed copies on sale will be the publisher's doing, not the responsibility of the author or his heirs. It is inconceivable that Section 24 should be interpreted to deprive its clearly intended beneficiaries, the author's widow and children, of the renewal copyright and to give it to a publisher because the publisher has not copyrighted the work or sold copies of it until after the author's death.

II.

A Work Made Public During Its Author's Lifetime is Not Posthumous Under Sec. 24

The Copyright Act does not state that a work delivered to the publisher and disseminated during its author's lifetime subsequently becomes "posthumous" because the publisher first sells or distributes copies of it after the author's death. But the District Court felt a semantic compulsion to read into Sec. 24 a definition which accomplished that result. We submit the Court erred, both in construing "posthumous" and "publication" as the terms are used in Sec. 24.

(i) As the Court recognized, Bartok's CONCERTO was not literally a "posthumous" work. It was not a child born after its creator's death. It had been conceived, born and was very much alive -- in major symphony-hall performances and radio broadcasts -- during its progenitor's lifetime. Thus, the basic, literal meaning of "posthumous" did not require the District Court to adopt a definition which will deprive authors' widows and children of the very rights Section 24 is intended to give them.

(ii) Contrary to the principles of interpretation set down in DeSylva v. Ballantine, supra, the Court read into the Act an alternative dictionary illustration of "posthumous" -- i.e. "publication" of a work after its author's death. The illustration, as interpreted by the Court, is inconsistent with the purpose and context of Sec. 24. And it is a colloquial term, used without any regard for the legal meaning of "publication" as a copyright

concept. Moreover, the District Court reached its conclusion by erroneously refusing to accept other copyright-law and dictionary definitions of publication which would have preserved the right of Bartok's son and widow to the renewal copyright.

(iii) If "publication" is a criterion of "posthumousness", then we submit that "publication" within the meaning of Sec. 24's "posthumous" proviso occurred during the author's lifetime. "Publication" occurred when the CONCERTO was performed before large audiences in two major symphony halls during Bartok's lifetime. "Publication" occurred when the Concerto was broadcast on radio during Bartok's lifetime. The performances and broadcasts were "publication" in one of the primary dictionary senses -- the act(s) of making something known to the public. See Marx et al v. U.S., infra.

(iv) The District Court rejected this argument on the ground that "publication" is limited to the sale and distribution of copies to the public; and that "publication" in this limited sense must be construed into the "posthumous" proviso of Sec. 24. Again the District Court erred. As this Court has emphasized, "it is, however, perfectly clear that the word 'publication' does not have the same meaning in all contexts (of the Act)." American Visuals Corp. v. Holland, 239 F. 2d 740, 743. Indeed, Section 24 contains a formidable example of this. The first sentence of the Section provides that "The copyright secured by this title shall endure for twenty-eight years from the date of first publication" and the Section closes with the same phrase. It is clear that the term "first publication" has two very different meanings as used in this sentence, and one of

them is quite different from the meaning "publication" has in Sections 10 and 26.

In these latter sections, "publication" means the sale, placing on sale or public distribution of copies. This is one of its meanings in the first sentence of Section 24. But there it also means securing copyright in an unpublished work, by registration and deposit, under Section 12. Marx et al. v United States, 96 F.2d 204. It was necessary to find this second and totally contradictory meaning of "publication" in Sec. 24 (despite its absence from any dictionary) to prevent the first term of copyrights in unpublished works from continuing for more than 28 years. Unpublished musical compositions and other works may not be "published" in the Sec.10-Sec.26 sense for 10, 20 or 30 years after their copyrights are secured by registration under Sec. 12. If "publication" in the first sentence of Sec. 24 were construed in the limited sense employed by the District Court (sale or public distribution of copies), then the original terms of copyright in such unpublished works would continue for 38, 48, 58 or more years -- or even in perpetuity.

(v) Thus, in Marx et al v. United States, the Court of Appeals noted that:

"The word 'publication' has no definite and fixed meaning. 'The word is legally very old and of no one certain meaning... The thought, however, running through all of the uses of the word, is an advising of the public, a making known of something to them for a purpose.' Associated Press v. International News Service, (C.C.A.2) 245 F. 244" (96 F. 2d at p. 206)

Certainly, the symphony-hall performances and radio

broadcasts of Bela Bartok's CONCERTO constituted a "publication" in that sense, and they were made during his lifetime. That meaning can be construed in the "posthumous" proviso of Section 24 even though performances and broadcasts do not constitute "publication" within the meaning of Sections 10 and 26*, and therefore did not preclude the subsequent securing of copyright under Section 10. Ferris v. Frohman, 223 U.S. 424; Heim v. Universal Pictures Co, Inc., 154 F. 2d 480; McCarthy & Fisher, Inc. v. White et al, 259 Fed. Rep. 364. Indeed, it is much easier to find this logical, well-accepted meaning of "publication" in the "posthumous" proviso, than it was for the Courts and Copyright Office to discover that "publication" in the Section's first and last sentences also included the antithesis of Sec. 10/26 "publication" -- the deposit of a single copy of an unpublished work, under Sec. 12.

(vi) The definition of "posthumous work" contained in the instruction on Copyright Office Registration forms is not binding on this Court. Twentieth Century-Fox Film Corp. v. Bouve, Register of Copyrights, 33 F. Supp 463; aff'd, 122 F.2d 51. See also, Copyright Office Circular 1B. We submit that "as primarily an office of record", the Copyright Office cannot thus cursorily dispose of so substantive an issue of statutory construction.

* Marx et al. v. United States, supra; American Visuals Corp. v. Holland, supra; Hirshon v. United Artists Corp., 243 F. 2d 640

III.

The District Court's Definition Would Produce Absurd and Illogical Applications Of The Posthumous Proviso Of Section 24

In construing provisions of the Copyright Act, courts have rejected interpretations that would produce absurd or illogical results which could not have been intended by Congress, or which would frustrate its intention. DeSylva v. Ballentine, supra; Marx et al. v. United States, supra; Brecht v. Bentley et al., 185 F. Supp. 890. Thus, in Brecht, the defendants argued that a copyright could not pass by intestacy since Sec. 28 only provides it "may be bequeathed by will." Rejecting this contention, Judge Bryan said that while the section

"... may not be artfully drafted ... it must be read to include intestate succession. Defendants' theory would lead to an absurd result which could not have been intended by Congress." (at p. 892)

The District Court's definition of "posthumous" -- first sale and distribution of copies after the author's death -- also would produce absurd results that could not have been intended by Congress. It would classify as "posthumous" works widely disseminated during their authors' lifetimes, under contracts executed by the authors. And in so doing, frustrate the clear intention of Congress that the authors' widows, widowers' and children should have the renewal copyrights. On the other hand, it would not classify as "posthumous" works that functionally and logically belong in that category. For example:

- (i) Three generations after an author's death, the unpublished, unknown score of one of his concertos is found in a trunk. The

legatee of his literary property, a university, grants rights to a publisher. Copyright is secured by registration under Sec. 12; the work is widely performed and broadcast; but copies are not sold or distributed. Consequently, under the District Court's definition, the work is not "posthumous" although it had been completely dormant and unknown during the author's life and for three generations after his death. His executor or next of kin -- three generations removed -- would secure the renewal copyright.

(ii) A publisher secures copyright in a concerto by registration under Sec. 12 and licenses widespread performances and broadcasts during the next twenty seven years of the author's life, and of the first term of copyright. Just before the close of the 27th year, the author dies, and the publisher makes its first sale and distribution of copies. Under the District Court's definition, the concerto would become "posthumous" at that point, the author's widow and children would be deprived of their renewal right, and the publisher would get the renewal copyright.

CONCLUSION

It is respectfully submitted that the District Court's judgment should be reversed and the CONCERTO FOR ORCHESTRA declared not to be a posthumous work under Section 24.

Respectfully submitted,

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IRWIN KARP, attorney for The Authors League of America, Inc.
and a member of the bar of this Court, hereby certifies that on
March 18, 1975, he served the annexed motion for leave to file
a brief amicus curiae and said annexed reply brief amicus curiae
of The Authors League of America, Inc. on the parties hereto
by delivering copies thereof to the attorneys for the parties,
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